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Class Counsel

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RACHEL CODY AND LINDSEY
KNOWLES, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

SOULCYCLE INC.,

Defendant.

Case No. 15-cv-6457-MWF-JEM

**NOTICE OF MOTION AND MOTION
FOR ATTORNEYS' FEES,
REIMBURSEMENT OF EXPENSES,
AND SERVICE AWARDS**

Date: October 2, 2017

Time: 11:30 a.m.

Judge: Hon. Michael W. Fitzgerald

Ctrm: 5A

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on October 2, 2017 at 11:30 a.m., or as soon thereafter as this matter may be heard, before the Honorable Michael W. Fitzgerald, United States District Court for the Central District of California, located at the First Street Courthouse, 350 West First Street, Courtroom 5A, Los Angeles, California 90012, Class Counsel will, and hereby do, move the Court pursuant to Federal Rule of Civil Procedure 23(h)(1) and 54(d)(2) for an order awarding: (1) attorneys' fees and costs to Class Counsel in the amount of \$1,790,000 (with no additional payment for Class Counsel's costs, which total \$141,342.51); and (2) Incentive Awards to the two Class Representatives of \$5,000 each.

As discussed in the accompanying memorandum, the requested awards are fair, reasonable and justified under applicable law. This motion is based on this Notice of Motion and the accompanying Memorandum of Points and Authorities; the Declaration of Nicholas Diamand; the Declaration of Daniel P. Hipkind; papers filed in support of preliminary and final approval; any oral argument by counsel at the hearing before this Court; any papers filed in reply; and all papers and records in this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Class Counsel respectfully move the Court for an award of attorneys' fees and costs¹ in the total amount of \$1,790,000, *inclusive of* costs. Class Counsel also respectfully move the Court for an award of Service Awards to each of the two Class Representatives in the amount of \$5,000 each, for a total \$10,000.

Class Counsel's fee request is well within the range commonly awarded in comparable cases and is justified here, particularly taking into account the economic benefits to the class, the value of the prospective practice changes undertaken by SoulCycle, and that the requested award includes all costs, even though costs may properly be recovered separately. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1049 (9th Cir. 2002). As discussed below, the prospective relief includes both economic benefits to the class valued between \$6.9 and \$9.2 million, as well as important changes to SoulCycle's business practices, including selling classes by geographic region instead of dollar value and revising its Terms and Conditions and Frequently Asked Questions – all of which were central to the allegations in this litigation. The Ninth Circuit has held that the value of settlement should be enhanced for purposes of fee analyses where there are significant “nonmonetary benefits conferred by the litigation.” *Id.* Class Counsel seek no such additional valuation here; the requested award of attorneys' fees and costs is warranted solely in light of the economic consideration delivered to the Class. Class Counsel's request is also supported by a lodestar plus multiplier cross-check. That cross-check reveals that the fee amount requested by Class Counsel would result in a multiplier of 1.05, which is well within the range for such multipliers established by the Ninth Circuit when costs are not included within the attorneys'

¹ In accordance with the Court's Order Granting Preliminary Approval of Proposed Settlement, Directing Notice to Class and Setting Final Approval Hearing, (the Preliminary Approval Order”), a copy of this brief will be uploaded to the settlement website, www.cycleclassaction.com/, upon filing.

1 fee award, as here. *Id.* at 1051 & n.6.

2 Class Counsel respectfully submit that their fee request is appropriate in light
3 of the result achieved for the Class, which includes prospective practice changes
4 designed to eliminate any confusion by SoulCycle customers about how its classes
5 are offered and when and if they expire. The Settlement also requires SoulCycle to
6 reinstate up to two expired classes (valued between \$30-\$40 per class) per Class
7 Member for a total of 229,646 reimbursed classes, unless the Class Member elects a
8 cash option, which provides \$25 per class up to two classes, with a maximum of
9 \$500,000 paid under this option. Consequently, Class Members are, collectively,
10 receiving between \$6.9-\$9.2 million in economic value. In light of this strong
11 result, and for the reasons discussed below, Class Counsel respectfully request that
12 the Court grant their fee request in full, and approve the requested Class
13 Representative service awards.

14 **II. BACKGROUND**

15 **A. The Conduct At Issue**

16 The conduct at issue in this litigation is the sale of SoulCycle classes, which
17 prior to February 2017 were marketed as being issued in specified dollar amounts.
18 For example, classes were sold in “Series” (*i.e.*, groupings) from a single class up to
19 a series of 50 classes, which were sold using phrases such as “SOUL30” and
20 “SOUL34.” SoulCycle customers provided an amount of money for each Series
21 that Plaintiffs alleged was then debited from the customer’s balance each time she
22 or he booked a class, such that SoulCycle’s business practices violated various gift
23 card laws. During the course of this litigation, specifically upon consideration of
24 two motions to dismiss, the Court dismissed Plaintiff’s claim pursuant to California
25 Civil Code § 1749.5, and allowed Plaintiffs’ claims to proceed under the Electronic
26 Funds Transfer Act and California Business and Professions Code § 17200 *et seq.*,
27 reserving the question whether the Complaint sufficiently alleged a UCL violation
28 based on the California Gift Certificate Law. Plaintiffs moved for certification of a

1 national and California class on October 31, 2016. Dkt. 71. Plaintiffs' class claims
2 against SoulCycle are on behalf of (i) SoulCycle customers nationwide who
3 purchased SoulCycle classes on or after August 25, 2014, whose classes expired
4 unused; and (ii) SoulCycle customers with a California billing address who
5 purchased a SoulCycle class on or after August 25, 2011 whose class expired
6 unused. (Second Amended Complaint ("SAC"), Dkt. 33, ¶ 74). SoulCycle opposed
7 Plaintiffs' class certification motion. Dkt. 105. The parties mediated twice, and on
8 April 21, 2017, filed a Joint Report of Mediation and Notice of Settlement in
9 Principle. Dkt. 217.

10 **B. Economic Consideration For The Class**

11 In addition to the prospective relief for the Class, the Settlement also
12 provides economic consideration to Class Members. SoulCycle will reinstate up to
13 two expired classes, unless the Settlement Class Member elects a Cash Option.
14 Specifically, each Settlement Class Member who purchased one SoulCycle class
15 that expired unused during the Class Period will receive one new class
16 automatically placed in his or her electronic SoulCycle account ("Reinstated
17 Class"). Those Settlement Class Members who purchased more than one
18 SoulCycle class that expired unused during the Class Period will automatically
19 receive two Reinstated Classes. The settlement provides the Class, in the aggregate
20 with 229,646 Reinstated Classes, Dkt. 221-2 at 10, which are valued between \$30
21 and \$40 each. The economic consideration Class Members receive is frictionless in
22 that Class Members need not take any action such as filing a claim form before
23 receiving the benefit of the Reinstated Class(es).

24 However, should a Class Member prefer cash instead of a Reinstated Class,
25 each Settlement Class Member can elect a Cash Option, which is a payment of a
26 maximum of \$25 per Reinstated Class to which the Settlement Class Member
27 would otherwise be entitled (the "Cash Option") up to a maximum of \$50 per
28 Settlement Class Member. Settlement Class Members can elect the Cash Option by

1 submitting a Cash Claim Form.

2 **C. The Prospective Changes Benefitting the Class**

3 As a result of the Settlement, SoulCycle has revised its marketing practices
4 and its Terms and Conditions and Frequently Asked Questions. These changes
5 provide important non-economic consideration from SoulCycle regarding its
6 business practices. This relief is designed to ensure that consumers fully
7 understand that purchasing a class or series of SoulCycle classes does not constitute
8 the purchase of a gift certificate or gift card.

9 Specifically, SoulCycle has clarified that its classes are not sold in specified
10 values, and will no longer refer to classes as “SOUL30” or “SOUL34.” Instead,
11 classes will be denoted by geographical region, as follows: SOUL-NYC (usable in
12 New York City); SOUL-DC (Washington, D.C.); SOUL-CT (Connecticut); SOUL-
13 WA (Washington); SOUL-NORCAL (Northern California); SOUL-HAMPTONS
14 (The Hamptons); SOUL-NYS-NJ (NON-NYC) (New York and New Jersey,
15 excluding New York City); and SOUL-FL-IL-TX-MA-MD-PA-SOCAL (Florida,
16 Illinois, Texas, Massachusetts, Maryland, Pennsylvania and Southern California).
17 SoulCycle also eliminated its class transfer feature to further clarify to customers
18 that SoulCycle classes are not gift certificates that can be redeemed services “up to”
19 a specified dollar amount.

20 SoulCycle has also revised its Terms and Conditions and Frequently Asked
21 Questions on its Website and smartphone App, among other things, to reinforce
22 that: (i) SoulCycle classes and SoulCycle gift cards are not the same product; (ii) its
23 gift cards never expire, though classes do; and (iii) although its classes have an
24 expiration date, if a rider cannot make the class in time and needs an extension, she
25 may contact SoulCycle to address having the class reinstated. Attached as Exhibit
26 2 to the Declaration of Daniel P. Hipkind In Support Of Plaintiffs’ Motion For
27 Preliminary Approval Of Class Action Settlement (Dkt. 221-1) is the full text of the
28 revised Terms and Condition and FAQs.

1 These changes were implemented as a result of this Settlement.

2 **D. Class Counsel Undertook Considerable Risk in Prosecuting this**
3 **Action**

4 This matter required Class Counsel to spend time on this litigation that could
5 have been spent on other matters. Moreover, because Class Counsel undertook
6 representation of this matter on a pure contingency-fee basis, they carried the risk
7 of expending substantial costs and time in litigating this action without any
8 monetary gain in the event of an adverse judgment.

9 Risks abounded in this case, which involved litigating a claim with little legal
10 precedent; there is not a vast body of EFTA law. That many of the issues here
11 lacked significant precedent made the outcome of the case less certain. For
12 example, in its Motion to Dismiss, SoulCycle relied heavily on *Hughes v.*
13 *CorePower Yoga*, No. 12-cv-00905, 2013 WL 1314456 (D. Minn. Mar. 28, 2013).
14 In *Hughes*, the Court held that yoga classes were not covered by the EFTA because,
15 in part, they were “not issued in a ‘specified amount.’” Dkt. 40 at 12. Further,
16 “[t]he Official Staff Interpretations of Regulation E specifically provides that cards
17 redeemable for a specific good, service, or experience such as a spa treatment, hotel
18 stay, or airline flight are not store gift cards under the EFTA.” *Id* at 12-13. Here,
19 the Court initially found that “Defendant’s class purchases are sold for a specified
20 value, and can only be used for classes equal to or less than that value,” (Dkt. 30 at
21 5) thereby falling under the EFTA. However, had this litigation progressed, there
22 was significant risk that the Court or a jury would determine that SoulCycle’s
23 classes were akin to those in *Hughes*, resulting in no benefits at all to the Settlement
24 Class.

25 SoulCycle advanced other strong counter-arguments and defenses. For
26 example, under the EFTA, Plaintiffs bear the burden of showing their alleged harm
27 occurred as “a result of” the EFTA violation. *See* 15 U.S.C. § 1693m(a)(1); *Brown*
28 *v. Bank of Am., N.A.*, 457 F. Supp. 2d 82, 90 (D. Mass. 2006). SoulCycle, relying

1 on its expert, argued that Plaintiffs could not prove that every unused expired
2 SoulCycle Class was the result of expiration dates. According to SoulCycle's
3 expert, it was not possible to assume that all consumers who failed to use their
4 SoulCycle classes did so due to expiration dates. Establishing causation was,
5 therefore, a risk as to both liability and class certification.

6 The Court dismissed Plaintiffs' California's Gift Certificate Law claim
7 finding it does not provide a private right of action. *See* Dkt. 37 at 25; Dkt. 40 at 7.
8 The Court allowed Plaintiffs to raise the issue later in the proceedings (Dkt. 40 at 7,
9 n.8), but SoulCycle argued were the claim reinstated, the ordinary meaning of "gift
10 certificate" contemplates something purchased intended as a gift for someone else.
11 *See, e.g., Reynolds v. Philip Morris USA, Inc.*, 332 F. App'x 397, 398 (9th Cir.
12 2009) (*quoting* Am. Heritage Dictionary of the English Language 742 (4th ed.
13 2000)) ("gift certificate" is a "certificate, usually presented as a gift, that entitles the
14 recipient to select merchandise of an indicated cash value at a commercial
15 establishment"). SoulCycle argued Plaintiffs testified they did not buy their class
16 to give away, and when riders want to buy a gift, they buy gift cards, not classes.

17 SoulCycle also asserted individual issues would render a class-action trial
18 unmanageable and inappropriate for Rule 23(b)(3) certification. First, SoulCycle
19 argued an EFTA claim can only be brought on behalf of consumers defined as
20 "natural person[s]." 15 U.S.C. § 1693a; *see also Kashanchi v. Texas Commerce*
21 *Med. Bank, N.A.*, 703 F.2d 936, 939-42 (5th Cir. 1983) (citing 15 U.S.C. §
22 1693a(5)). Plaintiffs sought to certify a litigation class including businesses.
23 Second, SoulCycle argued that determining whether a class is a "gift certificate"
24 would require individual analyses, and thus preclude class certification. A "gift
25 certificate" is defined as "[i]ssued on a prepaid basis primarily for personal, family
26 or household purposes to a consumer", and whether a gift certificate is so issued
27 "will depend on the facts and circumstances", 12 C.F.R. § 1005.20(a)(1)(i); 12
28 C.F.R. § 1005, Supp. I.

1 Throughout the litigation, SoulCycle vigorously contested both its liability
2 and Plaintiffs' ability to certify the asserted claims for class treatment. The Court
3 could have adopted SoulCycle's positions on liability, as well as its position that a
4 class could not be certified for purposes of trial. Similarly, had the litigation
5 proceeded, a class been certified and a jury found in favor of the Plaintiffs on
6 liability, there remains a risk that limited damages – or even none at all – could
7 have been awarded.

8 Lastly, there is always not only the risk of losing a jury trial but, also the risk
9 that even if Plaintiffs are successful at trial, recovery may be delayed for years by
10 an appeal or even overturned. The Court noted this possibility during the hearing
11 on Plaintiffs' class certification motion. Hipskind Decl. Ex. C at 31 (“And maybe
12 the District Court has already committed error and maybe the risk of that will affect
13 a settlement value, or maybe the – it will go up to the Ninth Circuit and the Ninth
14 Circuit will decide one way or the other.”). The Settlement, therefore, provides
15 substantial monetary and injunctive relief in the near term without the attendant
16 risks of unfavorable and, in some cases, dispositive, rulings on these and other
17 issues.

18 **III. ARGUMENT**

19 **A. The Requested Fee is Reasonable and Appropriate**

20 The Settlement Agreement provides that Class Counsel will apply for an
21 attorneys' fee award (inclusive of costs) of \$1,790,000. Dkt. 221-2 at 19. Class
22 Counsel now ask the Court to grant this fee. Class Counsel have litigated this
23 challenging case for almost two years, and after surviving two motions to dismiss,
24 they obtained a strong settlement after two mediations before experienced
25 mediators and countless negotiations directly between counsel for the parties. The
26 Settlement provides significant economic consideration to SoulCycle customers
27 who had classes expire. All told, the value of the Settlement to Class Members is
28

1 between \$6.9 million and \$9.2 million.² Importantly, for those Class Members who
2 elect to receive reinstated SoulCycle classes in lieu of the Cash Option, the
3 settlement is frictionless; these Class Members will not need to complete any
4 claims process to obtain the economic benefits of the Settlement. The Settlement
5 further provides well-tailored and important changes to SoulCycle's business
6 practices that will benefit and protect settlement Class Members – hundreds of
7 thousands of other SoulCycle customers – going forward.

8 Class Counsel's request is reasonable in light of the value achieved for the
9 class, particularly in light of Ninth Circuit law regarding attorneys' fees in class
10 cases that are designed to ensure that class counsel have proper incentives to take
11 on difficult cases and pursue class members' best interests. Class Counsel assumed
12 substantial risks and devoted substantial resources in pursuing a recovery for the
13 Class, and Class Counsel litigated this case efficiently.

14 1. **Class Counsel are Entitled to a Fee**

15 "Courts have long recognized the 'common fund' or 'common benefit'
16 doctrine, under which attorneys who create a common fund or benefit for a group of
17 persons may be awarded their fees and costs to be paid out of the fund." *Vasquez v.*
18 *Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491 (E.D. Cal. 2010) (citing *Hanlon v.*
19 *Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998)). "In the Ninth Circuit, a
20 district court presiding over a common fund case may award attorneys' fees based
21 on one of two methods: the lodestar method or the percentage method." *Bravo v.*
22 *Gale Triangle, Inc.*, No. CV 16-03347 BRO (GJSx), 2017 U.S. Dist. LEXIS 77714,
23 at *13 (C.D. Cal. Feb. 16, 2017) (citing *Hanlon*, 150 F.3d at 1029, *Staton v. Boeing*
24 *Co.*, 327 F.3d 938, 967-68 (9th Cir. 2003)). Class Counsel's request is reasonable
25 under either method. However, the percentage-of-the-fund method best aligns class
26 counsel's interests with those of the class, and properly incentivizes capable

27
28 ² There are 229,646 reimbursable classes in the settlement, which are valued
between \$30 and \$40 each.

1 counsel, not to only accept challenging cases, but to push for the best result that can
2 be achieved for the class. *See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396
3 F.3d 96, 122 (2d Cir. 2005) (percentage method “directly aligns the interests of the
4 class and its counsel”) (citation omitted). While the Court has discretion to use
5 either method, “the primary basis of the fee award remains the percentage method.”
6 *Craft v. Cty. of San Bernardino*, 624 F. Supp. 2d 1113, 1116 (C.D. Cal. 2008)
7 (citing *Vizcaino*, 290 F.3d at 1050).

8 2. **The Requested Fees Are Reasonable Under The Percentage**
9 **Method**

10 The Ninth Circuit “has established 25% of the common fund as a benchmark
11 award for attorney fees.” *Hanlon*, 150 F.3d at 1029. As noted above, Class
12 Counsel has achieved a settlement valued between \$6.9 million and \$9.2 million,
13 and requested fees of \$1,7900,000, including costs, for a total value of \$8.69-
14 \$10.99 million. *See Staton*, 327 F.3d at 966 (referring to a “hypothetical ‘fund’” or
15 the “‘putative fund’” determined by aggregating the “damages to members of the
16 class under the agreement, the amount of fees provided to various counsel, the costs
17 of the class action notices paid for by Boeing, and a gross amount of money
18 ascribed to all the injunctive relief contained in the agreement”).

19 As a preliminary matter, the Settlement agreement negotiated by Class
20 Counsel provides for SoulCycle to pay for class notice, which is a value to the
21 Settlement Class of over \$50,000. Dkt. 221-2 at § VI(8); Declaration of Kelly
22 Kratz Regarding Notice and Settlement Administration Activities Completed As Of
23 August 28, 2017 at ¶ 21. Further, Class Counsel do not ask the Court to quantify
24 the economic value of the substantial injunctive relief delivered through this
25 Settlement. Accordingly, the \$8.69-\$10.99 million value of the hypothetical or
26 putative total fund described herein understates the total value of the settlement. 25
27 percent of this range is between and \$2.17-\$2.75 million. Class Counsel’s request
28 for \$1,790,000 is therefore less than the Ninth Circuit’s benchmark, and squarely in
the range of reasonableness given the facts of this case, especially when considering

1 that the request is inclusive of costs, even though reasonable expenses may be
2 separately requested. *See Perkins v. LinkedIn Corp.*, No. 13-CV-04303-LHK, 2016
3 U.S. Dist. LEXIS 18649, at *54 (N.D. Cal. Feb. 16, 2016) (finding that “Class
4 Counsel effectively requests slightly less than the 25% benchmark” because “Class
5 Counsel's request is inclusive of costs, even though reasonable expenses may be
6 reimbursed separately in common fund cases.” (citing *Vincent v. Hughes Air W.,*
7 *Inc.*, 557 F.2d 759, 769 (9th Cir. 1977); *Wininger v. SI Mgmt. L.P.*, 301 F.3d 1115,
8 1121 (9th Cir. 2002).).

9 “When assessing the reasonableness of a fee award under the common fund
10 theory, courts consider ‘(1) the results achieved; (2) the risk of litigation; (3) the
11 skill required and the quality of work; (4) the contingent nature of the fee and the
12 financial burden carried by the plaintiffs; and (5) awards made in similar cases.’”
13 *In re Amgen Sec. Litig.*, No. CV 7-2536 PSG (PLAx), 2016 U.S. Dist. LEXIS
14 148577, at *24-25 (C.D. Cal. Oct. 25, 2016) (citing *Vizcaino*, 290 F.3d at 1048-50).
15 Applying these factors here confirms that Class Counsel’s request is more than
16 reasonable, and there is no downward pressure that would justify departure from the
17 requested fees.

18 *a. Class Counsel Achieved Excellent Results For Class Members*

19 First, the results achieved for the Class in this case are very strong. “The
20 result achieved is a significant factor to be considered in making a fee award.”
21 *Jones v. Bath & Body Works, Inc.*, No. CV 13-5206 FMO (AJWx), 2016 U.S. Dist.
22 LEXIS 89681, at *24 (C.D. Cal. July 11, 2016) (citing *In re Heritage Bond Litig.*,
23 2005 U.S. Dist. LEXIS 13555, (C.D. Cal. 2005); *Hensley v. Eckerhart*, 461 U.S.
24 424, 436 (1983) (“the most critical factor is the degree of success obtained”)).

25 Ninth Circuit courts consistently have held that where, as here, class counsel
26 achieves significant benefits that are not accounted for in the dollar value of the
27 common settlement fund, the court “should consider the value of [such] relief as a
28 relevant circumstance in determining what percentage of the common fund class

1 counsel should receive as attorneys' fees." *Staton*, 327 F.3d at 974; see also
2 *Vizcaino*, 290 F.3d at 1049 (affirming enhanced fee award where "the court found
3 that counsel's performance generated benefits beyond the case settlement fund.");
4 *Boyd v. Bank of Am. Corp.*, No. SACV 13-0561-DOC (JPRx), 2014 U.S. Dist.
5 LEXIS 162880, at *26 (C.D. Cal. Nov. 18, 2014) (finding 33 percent fees
6 appropriate when Class Counsel achieved significant non-economic benefits for the
7 class and others).

8 From the start, this litigation was driven by customers' negative reaction to
9 SoulCycle's expiration of classes that occurred despite these classes having the
10 hallmarks of other stored value instruments such as gift cards where expiration
11 dates are regulated by law. The Settlement achieves a major shift in SoulCycle's
12 business practices that is designed to eliminate confusion over whether its class
13 offerings fall under the gift card laws Plaintiffs accused SoulCycle of violating.
14 These changes in business practices include eliminating denominating classes by
15 dollar value, eliminating class transfer features allowing value to be transferred to
16 other geographic regions, and changing SoulCycle's documentation to clarify how
17 classes expire. These changes will positively affect the hundreds of thousands of
18 SoulCycle riders and millions of prospective consumers by eliminating confusion
19 about allegedly misleading business practices.

20 If the value of these benefits were considered, it would "reduce[] the overall
21 percentage of the fees that counsel" is requesting. *See Boyd*, 2014 U.S. Dist.
22 LEXIS 162880 at *26 (finding 33 percent fees appropriate when Class Counsel
23 achieved significant non-economic benefits for the class and others); *Perkins v.*
24 *LinkedIn Corp.*, 2016 U.S. Dist. LEXIS 18649 at *50 (considering non-economic
25 benefits such as changes in disclosures and documentation to support award);
26 *Spann v. J.C. Penney Corp.*, 211 F. Supp. 3d 1244, 1263 (C.D. Cal. 2016) (noting
27 that in addition to large monetary reward, "class counsel secured non-monetary
28 relief in the form of changed pricing policies, a compliance program, and training

1 for defendant's employees. In light of the exceptional result achieved by class
2 counsel for the class, the court finds that the requested fee award [27 percent of
3 fund plus almost \$200,000 in costs] is fair and reasonable.” (citation omitted)).

4 The Settlement also achieves substantial economic benefit to the Settlement
5 Class. Each class member will receive up to two reinstated SoulCycle classes,
6 which have a value of \$30-\$40 per class.³ A settlement value of \$30 to up to \$80
7 for each individual class member is a noteworthy result, especially in light of the
8 uncertainties that remained in this case at the time of settlement.

9 Further, the Settlement was the product of arm’s length, protracted, and
10 vigorous negotiations reached after two full-day mediation sessions before
11 experienced mediators. The assistance of experienced mediators who helped the
12 parties overcome their substantial differences bolster the reasonableness of the fee
13 request. *See, e.g. Perkins*, 2016 U.S. Dist. LEXIS 18649, at *51 (finding protracted
14 negotiations, “including two full-day mediations, with the assistance of two
15 different capable and experienced mediators” supported requested fee.).

16 Based on the strong result achieved for the class, the fees requested here are
17 reasonable.

18 *b. The Risk Of Litigation Is High*

19 Second, the risk of continued litigation is high and the outcome uncertain.
20 The claims at issue in this case had little legal precedent, which made the outcome
21 of the case less certain and supports the award of the requested fee. *See In re*
22 *Omnivision Techs.*, 559 F. Supp. 2d 1036, 1046-47 (N.D. Cal. 2007) (“The risk that
23 further litigation might result in Plaintiffs not recovering at all, particularly a case
24 involving complicated legal issues, is a significant factor in the award of fees.”);
25 *Spann*, 211 F. Supp. 3d at 1263 (finding that “plaintiff's results are exceptional
26 given that there was an absence of precedent. . .”).

27
28 ³ Class Members can also elect to receive a cash option, providing them \$25 in cash
per expired class up to \$50 total. Dkt. 221, § IV.A.6.

1 As discussed *supra* § II.D, issues continued to abound in this case around
2 whether SoulCycle's classes were issued in a "specific amount." For example,
3 SoulCycle relied heavily on a case where yoga classes were not found to be covered
4 by the EFTA because, in part, they were "not issued in a 'specified amount.'" Dkt.
5 40 at 12. Had this litigation progressed, there was significant risk that the Court or
6 a jury would determine that SoulCycle's classes were not issued in a "specified
7 amount," resulting in no benefits at all to the Settlement Class.

8 Other strong counter-arguments and defenses also created risk in this case.
9 For example, under the EFTA, Plaintiffs bear the burden of showing their alleged
10 harm occurred as "a result of" the EFTA violation. *See* 15 U.S.C. § 1693m(a)(1);
11 *Brown*, 457 F. Supp. 2d at 90. SoulCycle's expert argued that it was not possible to
12 assume that all consumers who failed to use their SoulCycle classes did so due to
13 expiration dates. Consequently, establishing causation liability and even class
14 certification would have been a significant risk had the litigation continued.

15 Risk also existed that the class would not be finally certified for trial.
16 SoulCycle asserted that individual issues would render a class-action trial
17 unmanageable and inappropriate for Rule 23(b)(3) certification. For example, a
18 "gift certificate" is defined as "[i]ssued on a prepaid basis primarily for personal,
19 family or household purposes to a consumer", and whether a gift certificate is so
20 issued "will depend on the facts and circumstances", 12 C.F.R. § 1005.20(a)(1)(i);
21 12 C.F.R. § 1005, Supp. I. SoulCycle argued that it would require individualized
22 analyses to determine whether its classes were sold as "gift certificates." The Court
23 could have adopted SoulCycle's positions on liability, as well as its position that a
24 class could not be certified. Even if a class was certified and a jury found in favor
25 of the Plaintiffs on liability, there remains a risk that limited damages – or even
26 none at all – could have been awarded. Courts often consider the substantial risks
27 of obtaining final certification and the uncertainty of trial as factors supporting
28 granting requested attorneys' fees. *See, e.g. Bravo v. Gale Triangle, Inc.*, No. CV

1 16-03347 BRO (GJSx), 2017 U.S. Dist. LEXIS 77714, at *47 (C.D. Cal. Feb. 16,
2 2017) (finding that “the high risks associated with this litigation weigh in favor of
3 awarding Plaintiffs' counsel's requested fee.”).

4 Finally, in addition to the risk of losing a jury trial, even had Plaintiffs
5 succeeded, recovery could be reversed, or at a minimum, delayed for years by an
6 appeal, which creates additional risks and postpones the significant gains achieved
7 by the Settlement. Given the risks, the results achieved by Class Counsel are
8 substantial, and support the requested fee award.

9 *c. The Issues In This Case Were Complex And Required Significant*
10 *Skill To Prosecute*

11 The effort and skill displayed by Class Counsel and the complexity of the
12 issues involved are additional factors used in determining a proper fee. *Vizcaino*,
13 290 F.3d at 1048; *In re Omnivision*, 559 F. Supp. 2d at 1046-47. These factors also
14 support the reasonableness of the fee requested here.

15 Class Counsel assembled a team of two law firms with the resources and
16 abilities necessary to litigate these claims. *See* Hipskind Decl. ¶¶ 1-7; Diamand
17 Decl. ¶¶ 1-4, Ex. A. As discussed *supra*, § II.D, little precedent exists for EFTA
18 cases, making Class Counsel’s navigation of the claims and complex issues all the
19 more skilled. *See, e.g. Spann*, 211 F. Supp. 3d at 1263 (C.D. Cal. 2016) (explaining
20 that “plaintiff's results are exceptional given that there was an absence of
21 precedent” and finding a 27 percent fee reasonable). Class Counsel performed
22 significant factual investigation prior to bringing these actions, engaged in motions
23 practice including opposing two motions to dismiss as well as numerous discovery
24 motions, engaged in written discovery, took 11 fact depositions and participated in
25 three expert depositions that required significant analysis and preparation, engaged
26 in protracted, challenging, and hard-fought negotiations with SoulCycle – including
27 participating in two full-day mediations – and vigorously and successfully
28 negotiated a strong settlement for the Class Members. In addition, given the limited

1 precedent regarding EFTA cases, the outcome achieved by Class Counsel required
2 sharp and creative lawyering. Class Counsel successfully navigated the complex
3 factual and legal issues in this case to deliver an outstanding result for Class
4 Members. *See id.*

5 The complex subject matter of the case and strong prosecution by Class
6 Counsel support the requested award.

7 *d. The Fee Was 100% Contingent*

8 Courts have long recognized that the public interest is served by rewarding
9 attorneys who assume representation on a contingent basis with an enhanced fee to
10 compensate them for the risk that they might be paid nothing at all for their work.
11 *Vizcaino*, 290 F.3d at 1051. Class Counsel prosecuted this case on a purely
12 contingent basis, and agreed to advance all necessary expenses knowing that they
13 would only receive a fee if there were a recovery. Class Counsel spent considerable
14 time and resources by, among other things: (1) investigating the action; (2)
15 conducting legal research and briefing oppositions to SoulCycle's two motions to
16 dismiss, as well as several discovery motions; (3) engaging in extensive discovery,
17 including 11 fact depositions that took counsel across the country and to Ireland,
18 along with three of expert depositions; (4) negotiating the Settlement over many
19 months, including by participating in two full-day mediation sessions; (5)
20 administering the Settlement; and (6) responding to Class Member inquiries. These
21 resources were expended notwithstanding the risk that Class Counsel would not be
22 compensated.

23 This assumption of risk justifies a fee paid as a percent of recovery. *See In re*
24 *Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555, at *68 (C.D. Cal. June 10,
25 2005) ("Courts consistently recognize that the risk of non-payment or
26 reimbursement of expenses is a factor in determining the appropriateness of
27 counsel's fee award.").

1 e. *A Comparison to Fee Awards in Other Cases Demonstrates the*
2 *Reasonableness of the Fee Requested*

3 A review of fee awards in other common fund cases underscores the
4 reasonableness of the fee requested here. Class Counsel's requested fee award is
5 less than the fee frequently awarded in class actions. *See, e.g. Omnivision*, 559 F.
6 Supp. 2d at 1047 ("in most common fund cases, the award exceeds that [25%]
7 benchmark."); *Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d
8 454, 457 (9th Cir. 2000) (affirming fee award of one third of common fund); *In re*
9 *Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13627, at *29 (awarding one-third of
10 fund); *Boyd*, 2014 U.S. Dist. LEXIS 162880 at *26 (finding 33 percent fees
11 appropriate when Class Counsel achieved significant non-economic benefits for the
12 class and others); *Spann*, 211 F. Supp. 3d at 1263 (awarding 27 percent fee plus
13 almost \$200,000 in costs); *Fernandez v. Vict. Secret Stores, LLC*, No. CV 06-
14 04149 MMM (SHx), 2008 U.S. Dist. LEXIS 123546, at *54 (C.D. Cal. July 21,
15 2008) (awarding 34 percent of fund). Class Counsel's fee request falls below the
16 25 percent benchmark given the \$8.69-\$10.99 million hypothetical or putative fund
17 consisting of \$6.9-\$9.2 million in economic benefits recovered for the Class and
18 \$1.79 million for attorneys' fees, and the reimbursement of costs. The value of this
19 hypothetical or putative fund does not include the significant, non-economic
20 benefits that accrued to the Class, nor does it reflect the costs of implementing
21 Class notice or the fact that Class Counsel is not making a separate request for
22 costs.

23 All told, Class Counsel's request for attorneys' fees are reasonable in light of
24 these factors. Class Counsel respectfully requests the Court grant its request.

25 **B. A Lodestar-Multiplier "Cross-Check" Further Confirms the**
26 **Reasonableness of the Fee**

27 The lodestar method has been criticized because it encourages counsel to bill
28

1 time and to create opportunities to bill time.⁴ Calculating the fee here as a
2 percentage-of-the-fund, rather than merely as a function of counsel's billed time,
3 rewards class counsel for assuming the risks of this case and efficiently prosecuting
4 it.

5 Nonetheless, the Court may engage in a lodestar "cross-check" when
6 awarding a fee as a percentage of a common fund, *Vizcaino*, 290 F.3d at 1050-51,
7 though it is not required. See *Moore v. Ulta Salon, Cosmetics & Fragrance, Inc.*,
8 No. CV 12-3224 FMO (AGRx), 2017 U.S. Dist. LEXIS 116361, at *26 (C.D. Cal.
9 July 25, 2017) (finding no reason to perform cross-check when awarding 25 percent
10 baseline).

11 The purpose of a cross-check is not to re-calculate the fee, but is one of the
12 tools used to ensure a reasonable fee. *Vizcaino*, 290 F.3d at 1050 n.5 ("The lodestar
13 method is merely a cross-check on the reasonableness of a percentage figure, and it
14 is widely recognized that the lodestar method creates incentives for counsel to
15 expend more hours than may be necessary on litigating a case so as to recover a
16 reasonable fee, since the lodestar method does not reward early settlement."). The
17 cross-check need not be precise to be informative. "[T]he lodestar 'cross-check'
18 need not be as exhaustive as a pure lodestar calculation." *Fernandez*, 2008 U.S.
19 Dist. LEXIS 123546, at *48 (citing *Young v. Polo Retail, LLC (Young II)*, No. C-

21 ⁴ The lodestar method's emphasis on time has drawn substantial criticism. *In re*
22 *Apple iPhone/iPod Warranty Litig.*, 2014 U.S. Dist. LEXIS 52050, at *8 (N.D. Cal.
23 Apr. 14, 2014) ("Whatever merits the lodestar method might have, particularly
24 outside the context of a common fund case, it has also been subject to heavy
25 criticism by commentators and in the courts.") (citation omitted). Among other
26 things, awarding fees based on the lodestar method "does not encourage
27 efficiency." *In re Activision Secs. Litig.*, 723 F. Supp. 1373, 1378 (N.D. Cal. 1989).
28 Instead, as the Ninth Circuit observed, "the lodestar method creates incentives for
counsel to expend more hours than may be necessary on litigating a case so as to
recover a reasonable fee." *Vizcaino*, 290 F.3d at 1050 n.5; see also *In re Activision*,
723 F. Supp. at 1378 (noting that lodestar approach "encourages abuses such as
unjustified work and protracting the litigation").

1 02-4546 VRW, 2007 U.S. Dist. LEXIS 27269, 2007 WL 951821, *3 (N.D. Cal.
2 Mar. 28, 2007)). The “lodestar calculation serves as a point of comparison by
3 which to assess the reasonableness of a percentage award. As a result, the lodestar
4 can be approximate and still serve its purpose.” *Id.* Here, even a partial cross-
5 check confirms the reasonableness of the fee.

6 1. The Lodestar Reflects Efficient Prosecution of This Action

7 The cumulative lodestar of Berger & Hipkind LLP and Lieff Cabraser
8 Heimann & Bernstein, LLP to date is \$1,700,998 using current billing rates.
9 Hipkind Decl. Ex. B; Diamand Decl. Exs. B-C. *See Chambers v. Whirlpool Corp.*,
10 214 F. Supp. 3d 877, 900 (C.D. Cal. 2016) (finding it “appropriate to award class
11 counsel attorney’s fees based on their current hourly rates as compensation for the
12 delay in payment.”); *Vizcaino*, 290 F.3d at 1051 (affirming lodestar crosscheck
13 using current billing rates). The rates are “in line with those [rates] prevailing in
14 the community for similar services by lawyers of reasonably comparable skill,
15 experience, and reputation.” *Blum v. Stenson*, 465 U.S. 886 at 895-96 n.11 (1984).
16 Class Counsel’s customary rates have recently been approved as reasonable by
17 another Court. *Perkins*, 2016 U.S. Dist. LEXIS 18649, at *52-53 (Koh, J.) (“This
18 Court has, within the last year, and other courts, have approved Class Counsel’s
19 customary rates used in calculating the lodestar here.”) (citing *In re High-Tech*
20 *Employee Antitrust Litig.*, No. 11-CV-2509-LHK, 2015 U.S. Dist. LEXIS 118052,
21 at *9 (N.D. Cal. Sept. 2, 2015) (additional citations omitted). The hours reflect the
22 extremely hard work and the efficient manner in which Class Counsel prosecuted
23 this case. *See* Hipkind Decl ¶ 17; Diamand Decl. ¶¶ 13-14.

24 2. Class Counsel’s Lodestar is Reasonable

25 The supporting declarations of Class Counsel set out the hours of work and
26 billing rates used to calculate the lodestar here. As described therein, Class Counsel
27 and their colleagues, including staff, have devoted a total of approximately 2,833.5
28 hours to this litigation and have a total lodestar to date of approximately

1 \$1,700,998. Hipkind Decl. Ex. B; Diamand Decl. Exs. B-C. These amounts do
2 not include the additional time that Class Counsel will spend going forward in
3 seeking approval of, and implementing, the Settlement, including assisting Class
4 Members with claims and overseeing claims administration generally. These tasks
5 can require substantial additional hours not reflected in a multiplier calculated on
6 the current lodestar. Class Counsel's lodestar will grow as the settlement process is
7 finalized and the litigation comes to a close. The claims period will last for several
8 weeks, and Class Counsel's time and resources devoted to the case will continue
9 until and past that date. Based on prior experience, these responsibilities can
10 demand substantial hours of work.

11 Class Counsel's time was spent primarily in the following tasks: (1)
12 investigating the claims of the Plaintiffs; (2) conducting legal research and briefing
13 oppositions to SoulCycle's two motions to dismiss; (3) engaging in extensive
14 discovery, including reviewing almost 100,000 pages of documents, responding to
15 24 interrogatories and 138 Requests for Admissions, engaging in 11 fact
16 depositions that took counsel across the country and to Ireland, along with three
17 expert depositions; (4) engaging in numerous discovery motions; (5) negotiating the
18 Settlement over many months, including by preparing for and participating in two
19 full-day mediation sessions; (6) administering the Settlement; and (7) responding to
20 Class Member inquiries.

21 Class Counsel's lodestar is reasonable. Class Counsel prosecuted the claims
22 at issue efficiently and effectively, actively seeking not to duplicate effort or
23 assignments. Tasks were reasonably divided among law firms and were delegated
24 appropriately among partners, associates, paralegals and other staff according to the
25 relevant complexity of the project.

26 Furthermore, Class Counsel's hourly rates are reasonable. In assessing the
27 reasonableness of an attorney's hourly rate, courts consider whether the claimed
28 rate is "in line with those prevailing in the community for similar services by

1 lawyers of reasonably comparable skill, experience and reputation.” *Blum*, 456
2 U.S. at 895 n. 11 (1994).

3 **C. The Requested Service Awards are Reasonable and Appropriate**

4 “In the Ninth Circuit, ‘[i]ncentive awards are fairly typical in class action
5 cases.’ Such awards ‘are intended to compensate class representatives for work
6 done on behalf of the class, to make up for financial or reputational risk undertaken
7 in bringing the action, and, sometimes, to recognize their willingness to act as a
8 private attorney general.’” *McNeal v. RCM Techs. (USA), Inc.*, No. 2:16-cv-05170-
9 ODW-SS, 2017 U.S. Dist. LEXIS 112137, at *1 (C.D. Cal. July 12, 2017) (granting
10 \$10,000 service award to the two named plaintiffs) (internal citation omitted). *See*
11 *also Staton*, 327 F.3d at 977 (“[N]amed plaintiffs . . . are eligible for reasonable
12 incentive payments”); *In re Toys “R” Us-Del., Inc. Fair & Accurate Credit*
13 *Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 470 (C.D. Cal. 2014) (“it is well-
14 established that the court may grant a modest incentive award to class
15 representatives, both as an inducement to participate in the suit and as
16 compensation for time spent in litigation activities, including depositions.”).

17 The requested service awards of \$5,000 for each Class Representative are
18 reasonable and appropriate here. “Many courts in the Ninth Circuit have . . . held
19 that a \$5,000 incentive award is ‘presumptively reasonable.’” *Hawthorne v.*
20 *Umpqua Bank*, 2015 U.S. Dist. LEXIS 56370, 2015 WL 1927342, *8 (N.D. Cal.
21 2015) (citing *In re Toys R Us-Delaware*, 295 F.R.D. at 470-72). *See also Resnick*
22 *v. Frank (In re Online DVD-Rental Antitrust Litig.)*, 779 F.3d 934, 947 (9th Cir.
23 2015) (approving \$5,000 incentive award even though it was “roughly 417 times
24 larger than the \$12 individual award” that unnamed class members would receive).

25 Here, the requested service awards are appropriate because the Class
26 Representatives have expended substantial time and effort in assisting Class
27 Counsel with the prosecution of the Class’s claims, including relating the details of
28 their disappointment and dissatisfaction of losing the classes they paid for as a

1 result of SoulCycle's alleged conduct, preserving relevant documentation and
2 evidence for discovery, assisting with discovery responses including document
3 requests, interrogatories and requests for admissions, sitting for all-day depositions
4 by opposing counsel, staying abreast of events in the litigation, and providing their
5 opinions on the proposed settlement. Dkt. 221-1, ¶ 16.

6 The requested service awards are also appropriate when compared to the
7 recovery achieved. Courts assessing the reasonableness of requests for service
8 awards may compare the request against the size of the settlement fund. *See, e.g.,*
9 *Resnick*, 779 F.3d at 948 (finding \$5,000 incentive award to each of nine named
10 plaintiffs reasonable, and explaining that the "incentive awards makes up a mere
11 .17% of the total settlement fund of \$27,250,000, which is far less than the 6% of
12 the settlement fund in *Staton* that went to incentive awards."). Plaintiffs' requested
13 service awards here collectively represent between 0.11 percent and 0.15 percent of
14 the economic benefit achieved for the class, which is even lower.

15 Given the significant efforts expended by the class representatives, the
16 presumptive reasonableness of the \$5,000 service award request, and the extremely
17 low amount that the service awards represent in light of the total settlement value,
18 the service awards should be granted.

19 **IV. CONCLUSION**

20 For the reasons set forth above, Plaintiffs respectfully request that the Court
21 grant the motion in its entirety.
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1 Dated: August 28, 2017

Respectfully submitted,

2
3 /s/ Daniel P. Hipkind

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